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October 3, 2021

Via ECFHonorable Edgardo Ramos
United States District Judge
United States Courthouse
40 Foley Square
New York, NY 10007Re: *United States v. Neil Cole*,
19 Cr. 869 (ER)

Dear Judge Ramos:

We respectfully submit this letter on behalf of Mr. Cole to provide the Court with additional information, and to address concerns expressed by the Court, regarding our request (unopposed by the government) that the Court seat only jurors who are vaccinated against COVID-19.

First, the Court understandably expressed a concern about the effect that a vaccination requirement may "have on selecting a fair cross-section of [the] community, particularly given the apparent significant disparities in vaccination levels as between white and Black and Hispanic and Asian individuals." (Conference Tr. at 92.) Based on recent vaccination data, such disparities no longer appear to exist. A September 28, 2021 nationwide poll from the Kaiser Family Foundation, for example, reported vaccination rates of 71% for white adults, 70% for Black adults, and 73% for Hispanic adults.¹ Similarly, a September 14, 2021 nationwide poll from the Pew Research Center reported

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¹ See KFF COVID-19 Vaccine Monitor: September 2021, Kaiser Family Foundation (Sept. 28, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-september-2021/>.

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vaccination rates of 72% for white adults, 70% for Black adults, 76% for Hispanic adults, and 94% for Asian adults.²

In New York City in particular, a vaccination requirement is likely to affect relatively few potential jurors. According to the most recent vaccination data from the New York City Department of Health, 83% of adult city residents have had at least one dose of a vaccine.³ Moreover, the most recent citywide demographic data (which appears to be less current than the overall data) demonstrates shrinking or non-existent disparities in vaccination rates among racial and ethnic groups. The Department of Health reports that the percentage of adult city residents who have received at least one dose of a COVID-19 vaccine is 61% for white residents, 54% for Black residents, 75% for Hispanic residents, and 92% for Asian residents.⁴ Accordingly, there does not appear to be a basis to conclude that a vaccination requirement would negatively impact the ability to select a fair cross-section of the community.

Second, the Court noted a concern about requiring potential jurors “to answer whether or not they have been vaccinated.” (Conference Tr. at 94.) We respectfully submit that such a question is no more intrusive than other health-related questions included in the standard *voir dire* questionnaire, *e.g.*, Question 47 (asking prospective jurors about any medical conditions that may affect their ability to serve); Question 48 (asking prospective jurors about any medications they take that may affect their ability to serve), or the questions that must be answered by visitors to the courthouse. We also understand that federal regulations scheduled to take effect next month will require that all federal employees be vaccinated, and official guidance from the federal government states that “visitors to federal buildings should be asked to provide information about vaccination status.”⁵

Third, there are health and safety concerns about seating unvaccinated jurors for a multi-week trial. COVID rates remain high in the New York City area, and unvaccinated individuals are significantly more likely to contract and spread COVID-19

² See *White Evangelical Protestants, Those with No Health Insurance Among Least Likely to Say They Have Received a COVID-19 Vaccine*, Pew Research Center (Sept. 14, 2021), https://www.pewresearch.org/science/2021/09/15/majority-in-u-s-says-public-health-benefits-of-covid-19-restrictions-worth-the-costs-even-as-large-shares-also-see-downsides/ps_2021-09-15_covid19-restrictions_00-05/.

³ NYC Dep’t of Health, COVID-19 Data: Vaccines, <https://www1.nyc.gov/site/doh/covid/covid-19-data-vaccines.page#nyc> (last accessed Oct. 3, 2021).

⁴ *Id.*

⁵ Safer Federal Workforce Taskforce, Vaccinations FAQ: Federal Contractors and Visitors, <https://www.saferfederalworkforce.gov/faq/vaccinations> (last accessed Oct. 3, 2021) (providing further that “[v]isitors who are not fully vaccinated or who decline to provide information about their vaccination status must provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building.”).

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than vaccinated individuals.⁶ We understand that the Southern District recently adopted a policy requiring all judges, employees and contractors working in a federal courthouse in this District to receive COVID-19 vaccinations.⁷ [REDACTED]

Finally, seating unvaccinated jurors could subject jurors (both vaccinated and unvaccinated) to “undue hardship,” *see* 28 U.S.C. § 1866(c)(1), and “disrupt the proceedings,” *see* 28 U.S.C. § 1866 (c)(2). For example, “if an unvaccinated person were to be a juror there is a substantial likelihood that they could contract and transmit COVID-19 to others, thereby ‘disrupt[ing] the proceedings.’” Order Granting Government’s Letter in Supp. of Court’s Decision at 2, *United States v. Elder*, No. 18 Cr. 92 (WFK) (E.D.N.Y. Sept. 3, 2021), ECF No. 328 (Exhibit A). In addition, vaccinated jurors may be reluctant or even unwilling to sit on a jury without assurances that their fellow jurors also are vaccinated. And, if vaccinated jurors were seated without receiving such assurances, there is a serious risk that they will be distracted during trial or deliberations by the prospect of being exposed to COVID-19 from an unvaccinated juror.

These concerns have led other district courts to exercise their “broad discretion” to select a jury by seating only vaccinated jurors, even over the objection of the defendant. *E.g.*, *Elder*, Letters and Orders re Jury Vaccination Requirements, (Sept. 2–3, 2021), ECF Nos. 324–28 (compiled as Exhibit A); *see also United States v. Holmes*, No.

⁶ *See, e.g., Tracking Coronavirus in N.Y.C.*, N.Y. Times, <https://www.nytimes.com/interactive/2021/us/new-york-city-new-york-covid-cases.html> (last visited Oct. 3, 2021) (“Because of very high Covid-19 transmission in New York City right now, unvaccinated people are at a very high risk.”). Vaccines continue to greatly reduce the risk of transmission even against the more transmissible Delta variant. *See* David W. Eyre *et al.*, *The Impact of SARS-CoV-2 Vaccination on Alpha and Delta Variant Transmission* (preprint posted Sept. 29, 2021), <https://www.medrxiv.org/content/10.1101/2021.09.28.21264260v1> (concluding from contact testing data that somebody infected with the COVID-19 Delta variant who has received two shots of the Pfizer vaccine is, on average, three times less likely to infect another person than is somebody infected with the COVID-19 Delta variant who has not been vaccinated).

⁷ *See* Nate Raymond, *SDNY courthouses Adopt Vaccine Requirement for Employees, Judges*, Reuters (Sept. 20, 2021), <https://www.reuters.com/legal/government/sdny-courthouses-adopt-vaccine-requirement-employees-judges-2021-09-20/>.

⁸ [REDACTED]

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18 Cr. 258 (EJD) (N.D. Cal. Aug. 25, 2021) (government and defendant agreed to exclude nine jurors who said they were not vaccinated).⁹ Here, the application to require that jurors be vaccinated is made by the defendant and unopposed by the government.

Thank you for your consideration.

Respectfully submitted,

/s/ Lorin L. Reisner

Lorin L. Reisner

Richard C. Tarlowe

cc: Counsel of Record (by ECF)

⁹ Sara Randazzo, *Jury Selection Under Way in Trial of Theranos Founder Elizabeth Holmes*, Wall Street Journal (Aug. 31, 2021), <https://www.wsj.com/articles/jury-selection-begins-in-theranos-founder-elizabeth-holmess-trial-11630402202> (“Other questions concerned jurors’ comfort level sitting in a courtroom during a pandemic and whether they have been vaccinated against Covid-19. Prosecutors and attorneys for Ms. Holmes agreed to cut nine jurors who said they weren’t vaccinated.”).